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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 867

NATHAN HERZOG AND EMANUEL HERZOG, INDIVIDUALLY AND AS CO-PARTNERS, TRADING AS COLUMBIA PICKLE WORKS, BANKRUPTS,

Petitioners,

vs.

JACK DORMAN, TRUSTEE.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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JOSEPH K. GUERIN,
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Of Counsel.

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vs.

JACK DORMAN, TRUSTEE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioners, Nathan Herzog and Emanuel Herzog, individually and as co-partners, trading as Columbia Pickle Works, pray that a writ of certiorari issue to review the decree of the United States Circuit Court of Appeals for the Second Circuit entered on the 14th day of October, 1941, reversing by a divided court an order of the District Court of the United States for the Southern District of New York

dated the 27th day of August, 1940, which granted a discharge in bankruptcy to petitioners (R. 129-130). The order of the District Court had reversed an order of the Referee in Bankruptcy denying discharge (R. 118-9).

Petitioners respectfully show as follows:

Jurisdiction.

The order on mandate below was entered on October 14, 1941 (R. 137).

Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended; 28 U. S. C. 347 (a).

Opinions Below.

The majority opinion of the Circuit Court of Appeals was written by Judge Swan, Judge Augustus N. Hand concurring (R. 134-136). Judge Clark wrote a dissenting opinion (R. 136-137). The opinions are reported in 121 F. (2d) 581.

The opinion of the District Court is set forth on pages 125-129 of the record. The opinion of the Referee in Bankruptcy appears in the record at pages 116-118.

Statute Involved.

The statute involved is Section 14.c.(2) of the National Bankruptcy Act, U. S. C. A., Title 11, Chap. 3, Sec. 32.c.(2), which is set forth in full in the Appendix attached hereto.

The Question Presented.

Where a bankrupt keeps books honest, though not legally sophisticated, does the Bankruptcy Act require more.

The Facts.

For approximately twenty-five years (fol. 337) prior to the filing of the petition in bankruptcy, the petitioners had been engaged in business in the retail sale of pickles

and condiments as employees of their father who had done business under the name of Columbia Pickle Works (fols. 375, 336-7). Their father died in or about 1929 and thereupon they filed a trade certificate in the office of the Clerk of the County of New York and continued as co-partners in the same business under the same name of Columbia Pickle Works (fol. 375). They were route salesmen, that is to say, that each was a chauffeur of an automobile truck with a specified route and as they visited their customers each day they took orders and made deliveries (fols. 267, 271). They worked from 8 A. M. to 7 or 8 P. M. daily (fol. 268).

In 1931 a corporation was formed known as the Columbia Pickle & Food Products, Inc. (fol. 347). Petitioners were the holders and owners of all the stock of that corporation (fol. 269) and continued as route salesmen and chauffeurs (fol. 267). The general management of the business was conducted by one Abraham Zinn (fol. 329). That corporation was intended to and actually did take over the entire business of the Columbia Pickle Works (fols. 273-4).

The corporation opened a full set of books and those books were regularly audited by a certified public accountant (fols. 24, 268) and thereafter every transaction was entered in the corporation books (fol. 300).

However, the bank account maintained by the co-partners in the Manufacturers Trust Company was continued in the name of Columbia Pickle Works and was never transferred into the name of the corporation. But every deposit made in the said account and every withdrawal therefrom was entered in the corporate books (fol. 258). Except for the fact that the bank account was not in the name of the corporation, the books were distinctly a corporate set of books (fols. 247-8).

Due to the fact that petitioners and their father had been doing business with the same people for so many years and

had always been known as the Columbia Pickle Works, after the formation of the corporation many customers continued to make their checks payable to Columbia Pickle Works although the billheads bore the name of the corporation. Many of the people from whom the corporation purchased merchandise billed Columbia Pickle Works and not the corporation. However, all transactions, both purchases and sales, were recorded in the corporation books of account (fols. 295-297), and those books truly and accurately reflect a complete and detailed history of all the business transactions had either by the Columbia Pickle Works or by Columbia Pickle & Food Products, Inc. The corporation filed its tax reports based upon all the business done as a single proprietor (fol. 300) and the petitioners filed their income tax reports showing only the receipt of salary from the corporation (fol. 301).

No charge is made that petitioners destroyed, concealed or removed any books or records (fol. 221), nor that the books did not truly record all the transactions of both the partnership and the corporation (fol. 351), and the sole question seems to be the propriety of the transactions of both the corporation and the partnership being kept in the same set of books (fol. 238).

The partnership and the corporation simultaneously filed their petitions and schedules in arrangement proceedings and submitted therewith a proposed plan of arrangement (fols. 245-246). In the proposed plan submitted by the petitioners there is contained the following statement:

> "That petitioners believe that they are not personally responsible for the obligations, but, there is some doubt in their minds and therefore have filed this petition in conjunction with the petition of the Columbia Pickle & Food Products, Inc." (fols. 175-6).

The schedules of both partnership and corporation listed the same assets and the same liabilities. Neither partner had any individual creditors (R. 135).

Reasons for Allowance of the Writ.

1. The Circuit Court of Appeals has decided an important question of bankruptcy law which should be finally settled by this Court.

2. The decision of the majority of the Circuit Court of Appeals in so far as it attempts to establish a standard of bookkeeping is in conflict with decisions of the Circuit Courts of Appeals for the Third, Fifth and Tenth Circuits.

3. The decision of the majority of the Circuit Court of Appeals, in reversing the District Court without finding an abuse of discretion by the District Court, is in conflict with decisions of the Circuit Courts of Appeals for the Sixth, Eighth, Ninth and Tenth Circuits.

4. The decision of the majority of the Circuit Court of Appeals, in so far as it holds "under the statute honesty is not enough," is in conflict with its own ruling that "a discharge is a privilege accorded to bankrupts by the statute unless they are chargeable with conduct showing some lack of personal business morality."

Wherefore, your petitioners respectfully pray that a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding that court to certify and to send to this court for its review and determination, on a day certain to be named therein, the full and complete transcript of the record and of all proceedings in the cause there entitled "In the Matter of Nathan Herzog and Emanuel Herzog, individually and as co-part-

ners, trading as Columbia Pickle Works, Bankrupts-Appellees; Jack Dorman, Trustee-Appellant"; and that the decree of the Circuit Court of Appeals in said cause be reviewed and reversed by this Honorable Court, and that your petitioners have such other and further relief in the premises as to this Honorable Court may seem meet and just.

NATHAN HERZOG,
EMANUEL HERZOG,
Individually and as Co-partners,
Trading as Columbia Pickle Works.

SUPREME COURT OF THE UNITED STATES

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NATHAN HERZOG AND EMANUEL HERZOG, INDIVIDUALLY AND AS CO-PARTNERS, TRADING AS COLUMBIA PICKLE WORKS, BANKRUPTS,

Petitioners,

vs.

JACK DORMAN,

Trustee.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Statement.

The facts are set forth in the petition, ante, pages 2-5.

As appears from the petition, a majority of the Circuit Court of Appeals, disagreeing with the District Court, denied petitioners' discharge in bankruptcy. Circuit Judge Clark in a vigorous dissenting opinion pointed out how inconsistent the majority opinion was with prior decisions of that Court and reasserted what we believe to be the established law in cases of this kind.

Summary of Argument.

Authoritative decisions overwhelmingly sustain and apply the principle of law contended for by petitioners and by Circuit Judge Clark in his dissenting opinion, namely, that the books and records maintained by petitioners met the requirements of the Bankruptcy Act.

The decision of the majority of the Circuit Court of Appeals in this case stands practically alone and is in sharp conflict with decisions of other Circuit Courts of Appeals and with prior decisions of that Court.

Point I.

The books and records maintained by petitioners met all the requirements of the Bankruptcy Act.

Upon the formation of the corporation, a full and complete set of books was opened and from that time on only one entity conducted business, to wit, the corporation. Those books were regularly audited by a certified public accountant. True it is that some bills and checks were issued to the partnership but regardless of that, every business transaction was entered in the regular books of account. Surely, investigation could easily determine whether or not petitioners had become personally liable because of such bills and checks. It is not contended that the books did not truly reflect the entire business history of both the partnership and the corporation. The narrow construction contended for by the Trustee is that the books alone, without investigation, do not disclose which are corporate creditors or partnership creditors (R. 74-6).

We submit that no such limitation may be placed upon the books. It is sufficient, if the books and records maintained are such that the financial condition and business transactions of the bankrupts might be ascertained therefrom. No formal books of account need be kept,

Anderson v. *Haddonfield National Bank*, 94 F. (2d) 721, (C. C. A. 3);

nor does the statute require or exact any particular form of books,

Hedges v. *Bushnell*, 106 F. (2d) 979 (C. C. A. 10);

nor is it necessary that books as such be kept, for the statutory requirement is in the alternative, books or records,

International Shoe Co. v. *Lewine*, 68 F. (2d) 517 (C. C. A. 5).

The rule laid down by the majority of the Circuit Court is that books must be kept in such a manner that from a mere examination thereof one can tell "whether the liability to a particular creditor is a debt of the partners or of the corporation, or whether an account receivable is a partnership or corporate asset" (R. 135). Such a construction is entirely too narrow and conflicts with a long line of authorities in other circuits. It stands practically alone, for the true rule seems to be exactly to the contrary.

> "The transactions need not be stated in full detail if they are so identified that inquiry can be made about them."
>
> *International Shoe Co. v. Lewine, supra,* at p. 518 (C. C. A. 5).

> "An impeccable system of bookkeeping which would meet with the approval of a skilled accountant or records so complete that they would satisfy an expert in business is not required as a prerequisite to discharge * * * It is enough if they sufficiently identify the transactions that intelligent inquiry can be made respecting them."
>
> *Hedges v. Bushnell, supra, at p. 982* (C. C. A. 10).

Indeed, here the bankrupts are being penalized not for a failure to keep books but rather for a failure to draw legal

conclusions which, as Judge Clark says in his dissenting opinion, "the bankruptcy court must—and I believe rather easily can—draw from the facts herein when it settles the bankrupt estate" (R. 137).

Point II.

The right to a discharge in bankruptcy is addressed to the discretion of the District Court and its action should not be disturbed unless it has abused that discretion.

There seems to be no rule of law more firmly established than that an appellate court will not disturb the action of a District Court in questions of discharge unless the District Court has committed a gross abuse of discretion.

Nix v. *Sternberg,* 38 F. (2d) 611 (C. C. A. 8);

Baash-Ross Tool Co. v. *Stephens,* 73 F. (2d) 902 (C. C. A. 9);

Third National Bank v. *Schatten,* 81 F. (2d) 538 (C. C. A. 6);

Hultman v. *Tevis,* 82 F. (2d) 940 (C. C. A. 9);

Texas National Bank of Beaumont v. *Edson,* 100 F. (2d) 789 (C. C. A. 5).

However, the court below seems to have disregarded that rule and to have substituted its own judgment for that of the District Court. Surely, it cannot be maintained in this case that the District Court abused its discretion, for there is no question whatsoever concerning the honesty of petitioners. What they did was done openly, honestly and candidly without any design to hide from creditors any transaction of any kind. There were complete books of account with every business transaction entered in them. If, after examining all the facts and circumstances the District Court was of the opinion that discharge should be granted,

its determination should not be disturbed by the appellate court. In the determination of the question whether a bankrupt's failure to keep books is justified,

> "it is evident that Congress intended that the district court should exercise a wide discretion.
>
> * * * * * * *
>
> "The case is one in which the court was required to exercise the broad discretionary power vested in it. Having done so, its action should not be disturbed on appeal."
>
> *Texas National Bank of Beaumont v. Edson, supra, at p. 791.*

> "The statute lodges in the bankruptcy court a reasonably wide judicial discretion in determining whether the failure to keep or preserve books of account or records was justified under all the circumstances of the case, and ordinarily the determination of the question will not be disturbed on appeal except in case of gross abuse of such discretion."
>
> *Hedges v. Bushnell, supra,* at p. 982.

Point III.

The honesty of petitioners being conceded, they were entitled to discharge.

While it is no longer necessary to show that the failure to keep books was with intent to conceal the financial condition and business transactions of the bankrupt, yet before discharge will be denied it is necessary that there be a showing of some design to cover up or conceal information, the furnishing of which would disclose assets.

In this case the court below has found that all transactions were entered in the corporate books, but it says that honesty alone is not enough to excuse petitioners. Such

a holding seems to be in direct conflict with a prior decision of the same court where it held:

> "A discharge is a privilege accorded to bankrupts by the statute unless they are chargeable with conduct showing some lack of personal business morality."
> *In re Lovich*, 117 F. (2d) 612, 615 (C. C. A. 2).

We cannot understand how petitioners' discharge can be denied when it is conceded that they were honest. If they were honest in their dealings, then they cannot be charged with a lack of "personal business morality." Indeed the decision of the majority here seems inconsistent with its decision in the *Lovich* case.

Again, as pointed out in the dissenting opinion of Judge Clark (R. 137), the protection offered by the court below to other bankrupts has been denied these petitioners.

See:

In re Marcus, 203 F. 29 (C. C. A. 2);
In re Livermore, 96 F. (2d) 93 (C. C. A. 2).

LAST POINT.

The petition for writ of certiorari should be granted.

Respectfully submitted,

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January 8, 1942.

APPENDIX.

UNITED STATES CODE ANNOTATED, TITLE 11, BANKRUPTCY.

CHAPTER 3—BANKRUPTS.

§ 32. Discharges, when granted.

c. The court shall grant the discharge unless satisfied that the bankrupt has (1) committed an offense punishable by imprisonment as provided under this title; or (2) destroyed, mutilated, falsified, concealed, or failed to keep or preserve books of account or records, from which his financial condition and business transactions might be ascertained, unless the court deems such acts or failure to have been justified under all the circumstances of the case; or (3) obtained money or property on credit, or obtained an extension or renewal of credit, by making or publishing or causing to be made or published in any manner whatsoever, a materially false statement in writing respecting his financial condition; or (4) at any time subsequent to the first day of the twelve months immediately preceding the filing of the petition in bankruptcy, transferred, removed, destroyed, or concealed, or permitted to be removed, destroyed, or concealed, any of his property, with intent to hinder, delay, or defraud his creditors; or (5) has within six years prior to bankruptcy been granted a discharge, or had a composition or an arrangement by way of composition or a wage earner's plan by way of composition confirmed under this title; or (6) in the course of a proceeding under this title refused to obey any lawful order of, or to answer any material question approved by, the court; or (7) has failed to explain satisfactorily any losses of assets or deficiency of assets to meet his liabilities: *Provided*, That if, upon the hearing of an objection to a discharge, the objector shall show to the satisfaction of the court that there are reasonable grounds for believing that the bankrupt has committed any of the acts which, under this subdivision c, would prevent his discharge in bankruptcy, then the burden of proving that he has not committed any of such acts shall be upon the bankrupt.

FEB 7 1942
CHARLES ELMORE CROPLEY
CLERK

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Petitioners,

vs.

JACK DORMAN, Trustee,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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THE COURT PRESS, N. Y. C.

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Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Question Presented.

Should a discharge in bankruptcy be granted to a partnership whose business transactions were recorded without separation or identification in the books of a corporation similarly engaged?

The petitioners misstate the question presented, in that they assume as facts that they kept books and that such books were "honest".

Summary of Argument.

The bankrupts failed to keep books of account or records, from which their financial condition and business transactions might be ascertained, which failure was not justified under all of the circumstances.

No special or important reasons exist for certiorari.

The Facts.

The bankrupts were engaged in the business of selling food products to retailers and restaurants. The partnership business commenced in 1929 (fol. 222) and was known as The Columbia Pickle Works. In 1931, the partners formed a corporation known as the Columbia Pickle & Food Products, Inc. (fol. 171). Both businesses were located and operated from the same building in New York City (fol. 208).

On March 22, 1939, the bankrupts filed their petition for arrangement under Chapter XI of the Bankruptcy Act, in which proceedings they were later adjudicated bankrupts. On the same day, the corporation filed its own petition for arrangement, which likewise resulted in an adjudication. The total liabilities of the partnership as disclosed in the schedules, as amended, are $33,930.70, and the assets are listed in the sum of $5,540.78 (fol. 184).

At the hearing on the specifications, it was stipulated that none of the physical assets of the partnership were ever transferred, assigned or sold to the corporation; that the partnership made purchases of merchandise from its creditors; that the corporation made its own purchases; that only the partnership had a bank account which was used for both the partnership's and corporation's business affairs including payments for merchandise purchased by the corporation; that all of the accounts receivable created in the operation of both businesses were charged on the billheads of the corporation, although the partnership never assigned or transferred its accounts receivable to the corporation; and that the income from such accounts receivable were deposited in the partnership bank account (fols. 211, 213).

The partnership assigned accounts receivable as security to two of its creditors who were listed as secured by reason thereof (fols. 44, 45).

Some of the creditors of the partnership instituted actions against it prior to the filing of the petition for arrangement herein. Actions were also instituted against the corporation (fols. 174, 177).

The books of account turned over to the Trustee in Bankruptcy on behalf of the partnership, were all those of the corporation, with the exception of those relating to the bank account which was in the partnership name (fol. 227). The books date from 1934 (fol. 219) although the corporation was formed in 1931 (fol. 171). All prior records are missing (fol. 249).

The Trustee's accountant who had examined the corporation's books (fol. 215) could not determine therefrom the assets of the partnership, the assets of the corporation, the liabilities of the partnership, the liabilities of the corporation (fol. 241), or the partnership accounts receivable, income or disbursements (fol. 228).

The accountant could not ascertain the financial condition and business transactions of the partnership from the books (fol. 222), and added, that in the absence of oral comment, there was nothing in the books which would show that the obligations therein contained were other than those of the corporation (fol. 240).

There was only one accounts payable record and only one accounts receivable record and there was no distinction made, or any symbols or other indication used to indicate that certain of the accounts receivable or accounts payable were treated differently from others (fol. 247).

POINT I.

The bankrupts failed to keep books of account or records from which their financial condition and business transactions might be ascertained.

The bankrupts were engaged in the operation of a business in which they personally obtained credit, incurred liabilities and acquired assets (fols. 211-213).

Under the standard set up by the practice of the day, merchants, actively engaged in business, are required to keep intelligible books of account or records from which their true financial condition and business transactions might be ascertained. *In re Weisman* (D. C. N. Y.), 1 Fed. Supp. 723; *Matter of Smith* (D. C. N. J.), 13 Fed. Supp. 20. In *McKibbon* v. *Haskell* (C. C. A. 8), 198 Fed. 639, the Court stated:

> "The Act of Congress proclaims the presumption and expectation of the law that honest merchants will keep account books which will disclose their true financial condition."

The Court, in *In re Hanna* (C. C. A. 2), 108 Fed. 238, held that Section 14 of the Bankruptcy Act intended to insure the keeping of correct and complete accounts and should be rigidly enforced.

The bankrupts did not keep separate books of account or records pertaining to the partnership's business.

The primary purpose of the Bankruptcy Act is the collection and distribution of the bankrupt's estate to creditors. *Williams* v. *U. S. Fidelity Co.*, 236 U. S. 549, 35 S. Ct. 289, 59 L. ed. 713. In this case, it is impossible to effectuate this purpose, since there is

nothing to indicate the partnership's liabilities and assets, as distinguished from those of the corporation.

Books and records are material to a proper administration of bankrupt estates for a number of reasons. They are required so that they may be checked against the oral statements or explanations made by bankrupt. *Matter of Underhill* (C. C. A. 2), 82 Fed. (2) 258. They are necessary to ascertain the dates of insolvency, important in connection with preferential and fraudulent transfers, if any. They are required to serve as a check against unfounded or fictitious claims of alleged creditors; to ascertain whether financial statements issued by the bankrupts are true or false; and to check in detail the disposition of the bankrupt's assets. In the absence of intelligible records, it is impossible for creditors to judge a bankrupt's true financial condition and determine whether the bankruptcy was an honest failure caused by business reverses, or an attempt to escape liability without surrender of property. *In re Magen Bros.* (C. C. A. 3), 192 Fed. 883; *Matter of Smith* (D. C. N. J.), 13 Fed. Supp. 20.

In *Matter of Underhill* (*supra*), 82 F. (2) 258, 31 A. B. R. (N. S.) 57, 60, the Court stated:

> "Complete disclosure is in every case a condition precedent to the granting of the discharge, and if such a disclosure is not possible without the keeping of books or records, then the absence of such amounts to that failure to which the Act applies. *Nix* v. *Sternberg, supra; Karger* v. *Sandler* (C. C. A., 2d Cir.), 22 Am. B. R. (N. S.) 423, 62 F. (2d) 80; *In re Miller* (D. C., Md.), 25 Am. B. R. (N. S.) 558, 5 F. Supp. 913 * * *.
>
> "The purpose and intent of section 14b of the Bankruptcy Act is to make the privilege of

discharge dependent on a true presentation of the debtor's financial affairs. It was never intended that a bankrupt, after failure, should be excused from his indebtedness without showing an honest effort to reflect his entire business and not a part merely. To be sure, there may be records which are not books; but it is intended that there be available written evidence made and preserved from which the present financial condition of the bankrupt, and his business transactions for a reasonable period in the past may be ascertained. Records of substantial completeness and accuracy are required so that they may be checked against the mere oral statement or explanations made by the bankrupt. See *International Shoe Co.* v. *Lewine* (C. C. A., 5th Cir.), 24 Am. B. R. (N. S.) 246, 68 F. (2d) 517, 518."

The Court, in *Matter of Weiner* (D. C. Md.), 28 F. (2d) 881, 12 Am. B. R. (N. S.) 651, 653, stated:

"It is true that for a number of years past the bankrupt appears to have kept books in this same manner. It is further true that there is no iron clad rule under the Bankruptcy Act requiring the keeping of any books. That is to say, a business may be so small that the total absence of them may be justified. Similarly, if books are kept, there is no particular form of accounting that need be followed. On the other hand, the election to keep them implies that they, if not by themselves, then in conjunction with other less formal records, shall *prima facie* give every evidence of an honest effort to reflect the entire business of the bankrupt. As long as there is any doubt on this point a court of bankruptcy should resolve that doubt for the benefit of creditors. A discharge is a privilege granted by the Act.

One who seeks thereby to avoid his debts must comply strictly with its provisions."

See also

Matter of Northridge (D. C. N. Y.), 53 F. (2) 858.

The objecting trustee met and discharged the burden of showing to the satisfaction of the Court that there were reasonable grounds for believing that the bankrupts failed to keep books of account or records from which their financial condition and business transactions could be ascertained. The burden then shifted to the bankrupts of showing that such failure was justified under all the circumstances of the case. Section 14 (c) Bankruptcy Act; *Karger* v. *Sandler* (C. C. A. 2), 62 F. (2) 80; *Nix* v. *Sternberg* (C. C. A. 8), 38 F. (2) 611.

POINT II.

The failure to keep books of account or records was not justified under all of the circumstances.

The Bankrupts' attempt to show justification was based upon the testimony of two witnesses. Their accountant since April or May, 1935 (fol. 287), stated that as far as he was concerned the corporation was the only identity (fol. 294), although the bank account was maintained in the name of the partnership (fol. 295). He stated that it was impossible to state from the books, with respect to the accounts payable, what was charged by creditors against the partnership and what was charged against the corporation (fol. 299). He could not state from these books the

extent of the partnership or corporate business (fol. 307).

The bookkeeping system employed by the bankrupts was highly objectionable to this accountant, who, in 1935, by letters, "insisted strongly that they should straighten the whole matter out" (fol. 299).

The bankrupts also produced their manager who had been in charge of the books for many years (fol. 329). This witness did the purchasing for both the partnership and corporation, but "the partnership was mostly buying merchandise, because they had the credit" (fol. 344). Even this witness could not state the amount and extent of the respective purchases made by the partnership or by the corporation (fol. 345).

The bankrupts offered no explanation for their failure either to keep a separate set of books or records or of their failure to separate or identify, in any form, their liabilities, assets or business transactions in the corporation's books. They did not urge that they kept a file of their bills payable. They made no attempt, during the course of the hearings to indicate from the books or records any information therein contained which would indicate their financial condition and business transactions.

The failure to keep books and records which are customarily kept by merchants called for an explanation but none was forthcoming. It is impossible to obtain any fair or proper understanding of the bankrupts' business transactions before the bankruptcy. *Matter of Krulewitch* (D. C. N. J.), 60 F. (2) 1039.

They could make no pretense of ignorance of the condition of the books since they had been warned

in writing by their own accountant as far back as 1935 that their bookkeeping system was highly objectionable and should be straightened out (fol. 299). The bankrupts were properly chargeable with intending the natural and probable consequences of their omissions. *Matter of Janavitz* (C. C. A. 3), 219 Fed. 876.

Concededly, under Section 14, no formal books of account need be kept, nor is any particular form of books required, nor is it necessary that books as distinguished from records be kept. Full details of all of the bankrupts' transactions need not be stated, if they are so identified that inquiry can be made about them. Further, the keeping of records of separate enterprises in the same set of books, is unobjectionable if the books separate or differentiate the transactions of the separate businesses (R. 135); *White* v. *Schoenfeld* (C. C. A. 2), 117 F. (2) 131.

All that is required, is that there be available substantially complete and accurate written evidence from which the bankrupts' business transactions and financial condition might be ascertained. *Matter of Underhill, supra,* 82 F. (2) 258.

Petitioners contend that from its inception, the corporation was the only entity which conducted business. This contention disregards the fact that the partnership and the corporation separately continued to obtain credit and make purchases, and the fact that both the partnership and the corporation were being sued separately by their respective creditors at the time of the filing of the petitions for arrangement (fol. 177). There was a real confusion as to what entity was liable (fols. 239, 240).

Petitioners contend that, in any event, since all of the partnership activities were reflected in the corporation's books, there was a sufficient groundwork therein contained to enable an outside investigation to determine the assets and liabilities of the partnership. The wording of Section 14, however, specifically provides for books or records "*from which*" the financial condition and business transactions might be ascertained. *Matter of Smith (supra)*, 13 F. Supp. 20; *Matter of Weiner (supra)*, 28 F. (2) 881. In any event, the bankrupts failed to sustain the burden of going forward with the evidence to prove that an outside investigation would have disclosed the liabilities, assets, and disposition of assets.

Petitioners rely upon *International Shoe Co.* v. *Lewine,* 68 F. (2) 517, and *Hedges* v. *Bushnell,* 106 F. (2) 979, where the Courts held that it is enough if the books or records sufficiently identify the transactions so that intelligent inquiry can be made respecting them. But in those cases and in *In re Livermore,* 96 F. (2d) 93; and in *In re Marcus,* 203 F. 29, also cited by petitioners, the books or records were exclusively those of the bankrupts and the entries therein contained related solely to and were identified only with the bankrupts' businesses. This is not true in the case at bar.

Petitioners contend that they were entitled to a discharge since their honesty was "conceded". There was no such concession. There was no finding of honesty by the Referee before whom the issues were tried, and who had the jurisdiction to grant or deny the discharge. Section 38 (4) Bankruptcy Act. In the absence of books and records, it is impossible to arrive at this conclusion.

However, honesty alone is not sufficient justification for failure to keep books or records. There is nothing in the Bankruptcy Act, nor are there any decisions, to the effect that an "honest" bankrupt is excused from keeping books or records. No authority is cited for the statement in petitioners' brief, that "before discharge will be denied it is necessary that there be a showing of some design to cover up or conceal information, the furnishing of which would disclose assets" (p. 11).

There is no conflict between the holdings of the Circuit Court in the case at bar, and in *In re Lovich*, 117 F. (2) 612. In the latter case, the objection to discharge charged the commission of an offense punishable by imprisonment, by the making of a false oath as to the denial of the issuance of a financial statement. Books or records were not involved. The proof disclosed that a financial statement signed by the bankrupt's manager had been issued without the bankrupt's knowledge.

The other cases cited in Point III of petitioners' brief are inapplicable. *In re Marcus* (*supra*), 203 F. 29, the only objection was that the bankrupt's books did not contain a yearly inventory. *In re Livermore* (*supra*), 96 F. (2) 93, the incorrect entry in the bankrupt's books was made while the bankrupt was in Europe, and without his knowledge. Neither case presented the factual situation under consideration in the case at bar.

It is respectfully submitted that under all the circumstances there was no justification for the failure of the bankrupts to keep books of account or records from which their financial condition and business transactions might be ascertained.

POINT III.

No special or important reasons exist for certiorari.

The decision of the Circuit Court of Appeals is not in conflict with the decisions of other Circuits. The decisions of the other Circuit Courts do not pass upon the question presented in the case at bar (Point II, *supra*).

The decision of the Circuit Court of Appeals is not in conflict with its previous decision in *In re Lovich* (*supra*), 117 F. (2) 612, where, as heretofore stated, an entirely different question was presented for consideration (Point II, *supra*).

The decision of the Circuit Court of Appeals is of limited application, due to the unusual facts presented, and is not of general importance.

CONCLUSION.

It is respectfully submitted that the petitioners have shown no reason for granting their petition for certiorari and the petition should be dismissed.

Respectfully submitted,

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